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10/820,349	04/08/2004	John J. Merianos	FDN-2837	8164

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EXAMINER

WEDDINGTON, KEVIN E

ART UNIT	PAPER NUMBER
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1614

MAIL DATE	DELIVERY MODE
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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Claims 1-4, 6, 7 and 11-19 are presented for examination.

Applicants' amendment and response filed December 2, 2008 have been received and entered for appeal purposes.

Accordingly, the rejection made under 35 USC 112, first paragraph (Written Description) as set forth in the previous Office action dated October 2, 2008 at pages 2-4 as applied to claim 1 is hereby withdrawn because the applicants amended the claim to recite the preferred 1,2-diols.

Allowable Subject Matter

Claims 12-14 are allowable.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of

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the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1, 3, 7, 11, 15 and 18 are again rejected under 35 U.S.C. 103(a) as being unpatentable over JP 11322591 A, hereby known as Kobayashi et al., of record, for reason of record as set forth in the previous Office action dated October 2, 2008 at pages 4-5 as applied to claims 1, 3, 7, 11, 15 and 18.

Applicants' remarks regarding the prior art, Kobayashi et al., does not disclose each and every limitation of the pending claims because the pending claims recite an antimicrobial composition **consisting essentially of** defined amounts of (a), (b), and optionally (c) are not persuasive since the prior art may disclose other agents; however, the other agents do not materially affect the basic and novel characteristic of the antimicrobial composition (See In re Herz, 537 F.2d, 551-52, 190 USPQ 461, 463 (CCPA 1976)). Again, the prior art discloses the same antimicrobial composition comprising: (a) a C4-C10 1,2-alkanediol (same as 1,2diol) in combination with (b) benzoic acid and phenoxyethanol.

The rejection made under 35 USC 103(a) is adhered to.

Claims 1, 3, 7, 11, 15 and 18 are not allowed.

Claim Rejections - 35 USC § 103

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-4, 6, 7, 11 and 15-19 are again rejected under 35 U.S.C. 103(a) as being unpatentable over JP 2003286153 A, hereby known as Takahashi et al., of record, for reason of record as set forth in the previous Office action dated October 2, 2008 at pages 5-7 as applied to claims 1-4, 6, 7, 11 and 15-19.

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Applicants' remarks regarding the prior art, Takahashi et al., does not disclose each and every limitation of the pending claims because the pending claims recite an antimicrobial composition **consisting essentially of** defined amounts of (a), (b), and optionally (c) are not persuasive since the prior art may disclose other agents; however, the other agents do not materially affect the basic and novel characteristic of the antimicrobial composition (See In re Herz, 537 F.2d, 551-52, 190 USPQ 461, 463 (CCPA 1976)). Again, the prior art discloses the same antimicrobial composition comprising: (a) sorbic acid or benzoic acid; (b) phenoxyethanol; and (c) diols wherein the diols are 1,2-pentanediol and 1,2-hexanediol.

The rejection made under 35 USC 103(a) is adhered to.

Claims 1-4, 6, 7, 11 and 15-19 are not allowed.